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Corbin R. Davis, Clerk
Michigan Supreme Court
PO Box 30052
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re: Revised MCR 9.128 (file #2002-14)

Dear Mr. Davis:

By this letter, I would like to comment to the Court on revised MCR 9.128. For the reasons set out below, I respectfully submit that assessing "basic administrative costs" against attorneys found to have engaged in professional misconduct is an undesirable and probably unconstitutional means of bridging a funding gap in the attorney discipline system.

Overview. The Court's concerns leading up to the revision of the rule appear to have been prompted by the belief that existing revenue sources for the attorney discipline system will not be adequate to meet the future financial obligations of the system. In fiscal 2001 the system's expenses exceeded its revenues by $244,079.00 ($3,241,378.00 revenue and $3,485,457.00 expenses) for the first time. 2001 Annual Report of the Attorney Discipline Board. By way of contrast, in fiscal 1999 system revenues were $3,279,406.00 and expenses were $3,075,744.00, and in fiscal 2000 revenues were $3,316,412.00 and expenses were $3,077,161.00. 1999 and 2000 Annual Reports of the Attorney Discipline Board.

Because new case filings from 1999 forward have been so significantly lower than in the past, seeking ways to reduce system expenses rather than increase revenues (or some combination of the two) may be particularly appropriate and feasible at this time. New case filings reached a high of 318 in 1997 and a low of 175 in 2001. From 1994 through 1998, the average number of new case filings was 275; from 1999 through 2001, the average number of new case filings was 194, a drop of approximately 30%.

Revised Rule 9.128 and the system budget. As amended, MCR 9.128 assesses both actual expenses and "basic administrative costs" against an attorney who is the subject of an order of discipline or an order granting or denying a petition for reinstatement. MCR 9.128(A). The "basic administrative costs" imposed are $750.00 in cases of discipline by consent and petitions for reinstatement involving orders of discipline of less than 3 years, MCR 9.128(B)(1)(a)&(c), and $1,500.00 for all other orders imposing discipline and for petitions for reinstatement involving discipline of three years or more or revocation. MCR 9.128(B)(1)(b)&(d). This amount may only

be reduced by the Board "[u]nder exceptional circumstances". MCR 9.128(A).

Significantly, if the revised rule had been in effect over the past three fiscal years, an average of $152,250.00 would have been added to the system's revenues each year.[1] However, based on fiscal 2001 revenues and expenses, the revised rule would not have generated enough new revenue to make up the shortfall. The fiscal 2001 deficit was $244,079.00, yet only $147,000.00 would have been generated for fiscal 2001, leaving the system with a deficit of $97,079.00 for the year.

Objections to the revised rule. It is a fundamental element of due process -- applicable in attorney discipline proceedings because of their quasi-criminal nature[2] -- that a system for financing a judicial function which offers "'a possible temptation to the average man as a judge'" "'not to hold the balance nice, clear, and true between the state and the accused'", including when the judge's "'executive responsibilities ... may make him partisan to maintain the high level of contribution from the ... court,'" "'necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'" Ward v Village of Monroeville, 409 US 57, 60, 93 SAT 80, 34 LADD 267 (1972). The same considerations apply to maintaining the fairness of prosecution decisions.

Revised Rule 9.128 as amended is objectionable because the combination of the revised rule and the substantial budget deficit create palpable, not merely possible, temptations for both the

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[1]In 1999, there were 59 orders of discipline by consent, 64 orders of discipline not by consent, nine petitions for reinstatement granted and apparently no petitions for reinstatement denied. Assuming (conservatively) that each of the petitions for reinstatement did *not* involve an order of discipline of three years suspension or longer (since the Annual Reports do not provide a breakdown), this would have yielded $156,750.00 in additional system revenue under the amended rule. In 2000, there were 58 orders of discipline by consent, 68 orders of discipline not by consent and ten petitions for reinstatement granted or denied, which would have generated $153,000.00 additional revenue to the system. In 2001, there were 59 orders of discipline by consent, 64 other orders of discipline and nine petitions for reinstatement either granted or denied for additional revenue of $147,000.00.

[2]Both the United States Supreme Court and the Michigan Supreme Court have long held that attorney discipline proceedings are quasi-criminal in character and that many of the safeguards applicable in criminal prosecutions are, therefore, applicable in these proceedings. *Cf.*, *e.g.*, Gentile v State Bar of Nevada, 501 US 1030, 1048, 111 SCt 2720, 115 LEd2d 888, 906 (1991); In re Ruffalo, 390 US 544, 550-551, 88 SCt 1222, 20 LEd2d 117, 122 (1968); State Bar v Jaques, 401 Mich 516, 528 (1977) ("allegedly errant attorney has a right ... to be fairly and specifically informed of the charges against him"); State Bar v Freid, 388 Mich 711, 715 (1972); State Bar v Woll, 387 Mich 154, 161 (1972); In re Baluss, 28 Mich 507 (1874).

Commission and the Board to consider the economic consequences of their decisions in the process of rendering those decisions. These temptations are exacerbated by the fact that both Commission members and Board members are Court appointees. They are further exacerbated by the facts that

- If the revised rule had been in effect in fiscal 2001 and the Commission and the Board had decided each matter within their discretion that year as they in fact did, insufficient revenue would have been generated to make up the shortfall, and

- The average number of new case filings has been on a significant downward trend for several years now.

Thus, for the budget to have been balanced in 2001 under this rule, more respondents would have had to be disciplined and/or more respondents disciplined by consent would have had to be disciplined not by consent. The implications of these facts for the integrity of the system's decision-making process are enormously troubling.

The revised rule also presents the appearance of unfairness. The Bar and the public must now wonder, particularly in any close case, whether the Commission's or the Board's decision-making process is being affected by budget considerations. The fact that the system even generates this question seriously undermines its integrity and the confidence the Bar and the public can have in it.

The danger that decision-making will, in fact, be affected by budget considerations is particularly great in the case of the Commission:

- In fiscal 2000 the Commission issued 185 admonishments (as compared with 209 new cases filed). An admonishment is not discipline, of course, MCR 9.106(6), and is, therefore, not subject to assessment of "basic administrative costs". Some cases resulting in admonishments present close questions as to how they should most appropriately be resolved. The revised rule creates a substantial temptation to the Commission to offer fewer admonishments and issue more formal complaints in order to generate more revenue for the system;

- About 40% of all filed cases result in discipline by consent. In some of these cases, the parties are able to agree on the appropriate level of discipline without a great deal of difficulty. Under the revised rule, the Commission will have an incentive not to agree to discipline by consent even where there is no disagreement with a respondent's proposed consent resolution of a case. If the Commission does not consent to the level of discipline but leaves the decision up to a hearing panel instead, the amount of "basic administrative

costs" assessed against the respondent doubles from $750.00 to $1,500.00;[3] and

• The rule is subject to manipulation through Commission decisions as to how formal complaints are drafted. Currently, it is not unusual for a single formal complaint to allege misconduct arising out of multiple separate alleged incidents. The new rule creates an incentive for the Commission to charge each alleged incident in a separate formal complaint in order potentially to generate multiple assessments of "basic administrative costs".

The revised rule is also objectionable because it is, in fact, punitive, both legally and financially:

• If an attorney is found to have engaged in misconduct, it punishes him or her for exercising the right to a hearing, impermissibly imposing a substantial burden on the exercise of the fundamental right to put the state to the test of its allegations. Whatever the merits of "user fees" for public services used by persons as a matter of choice, such fees are inappropriate in a quasi-criminal system which does not give respondents the choice or participating in it or not;

• Regardless of how the $750.00 or $1,500.00 is labeled, it is a punitive sanction inconsistent with the directive of MCR 9.105 that "[d]iscipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession";

• The punitive nature of the sanction is particularly unwarranted in most discipline cases. The single largest category of professional misconduct resulting in discipline is consistently neglect of client matters (as opposed to intentional misconduct), generally comprising about 40% of all orders of discipline. *Cf* ADB Annual Reports for 1999-2001. Cases involving neglect are especially undeserving of a punitive-type sanction. In addition, in my experience representing respondents in discipline proceedings for more than a decade, most attorneys who get into trouble with the discipline system have not been financially successful in practice and cannot easily pay an additional $750.00 or $1,500.00 in costs;[4] and

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[3]This circumstance also unreasonably skews the negotiating process, as it creates a greater incentive for a respondent to settle on the Commission's terms in order to avoid an additional $750.00 in costs to resolve the case against him or her.

[4]The burden of these assessments is likely to be particularly unfair in cases against attorneys growing out of representation in criminal cases. Criminal defense work is the category of representation most likely to result in a grievance, as lawyers representing clients in criminal cases

- The revised rule also fails to provide an adequate opportunity for relief from this burden, allowing relief only in "exceptional circumstances", and it fails to give hearing panels and the Board adequate discretion not to impose the assessment where doing so would be inappropriate for any reason.

The revised rule is bad policy for yet another reason. There are many areas of ethics law which are gray or unsettled and as to which litigation provides an important benefit to the Bar and the public by clarifying the previously uncertain law. It makes no more policy sense to assess "basic administrative costs" against the respondent who in good faith unsuccessfully litigates such an issue than it would to assess costs against the Commission in such a case when the outcome favors the respondent.

It is also noteworthy that the vast majority of other states do *not* supplement the funding of their discipline systems by assessing "basic administrative costs" against disciplined attorneys. From information gathered by Mr. VanBolt, it appears that possibly only seven other states assess "basic administrative costs" in connection with orders of discipline. January 23, 2002, memorandum from John VanBolt to John Allen, chairperson, State Bar Committee on Grievance. The maintenance of an attorney discipline system is the responsibility of the Bar as a whole. Michigan has wisely chosen this course in the past as have almost all other states. Using the 2001 budget shortfall as an example, Michigan's discipline system budget problem would more appropriately and more fairly be resolved through a dues increase of $20.00 per attorney, as recommended to the Court by the Commission earlier this month.

For all of these reasons, I believe the amended rule to be inappropriate and likely a violation of respondents' rights to due process of law. I encourage the Court promptly to repeal it and to seek the bar dues increase proposed by the Commission.

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routinely account for about 30% of all grievances filed. *Cf., e.g.,* 2000 ADB/AGC Joint Annual Report (1,070 of 3,373 grievances involved representation in criminal cases). A very large percentage of criminal defendants are represented by court-appointed counsel, and many criminal defense attorneys rely substantially on appointed counsel fees for income. Michigan ranks 49th nationally in funding for indigent defense in criminal cases. *Cf.* Neckers, "President's Page", Mich Bar J 81:1, 8 (January 2002). As a result, criminal defense lawyers are the most vulnerable to grievances and among the least able to afford a "basic administrative costs" assessment if found to have engaged in misconduct.

Thank you for your consideration of these views.

Sincerely,

Kenneth M. Mogill

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